

## Chapter 17. Prevailing Wages For Public Works Projects

### Subchapter 1 General Provisions

24.17.101 PURPOSE AND SCOPE (1) These rules are adopted pursuant to 18-2-431, MCA, giving the commissioner rulemaking authority to implement the Montana Prevailing Wage law, commonly known as Montana's "Little Davis-Bacon" Act (18-2-401, et seq., MCA). The purpose of the above referenced statutes and these rules is to protect local labor markets, to maintain the general welfare of Montana workers on public works projects, to eliminate wage cutting as a method of competing for public contracts, to maintain wages and rates paid on public works at a level sufficient to attract highly skilled laborers performing quality workmanship and to prevent the rate of wages from adversely affecting the equal opportunity of Montana contractors to bid on public works.

(2) In 1931, the legislature enacted the Montana "Little Davis-Bacon" Act. The Act requires a hiring preference for Montana workers in all contracts let for public works, a 50% preference on public works projects, excluding projects involving the expenditure of federal aid funds or where residency preference laws are specifically prohibited by federal law, and empowers the commissioner to determine the minimum wage rates to be paid to all workers on public work contracts.

Rule 24.17.102 reserved

24.17.103 DEFINITIONS As used in this subchapter, the following definitions apply, unless the context of the rule clearly indicates otherwise:

(1) "Act" means 18-2-401 through 18-2-432, MCA.

(2) "Adverse decision" means a decision by the department, or a hearing officer that is not favorable to the party who wishes to have the decision reviewed.

(3) "Apprentice" means a worker employed to learn a skilled trade under a written apprenticeship agreement registered with the department or the U.S. bureau of apprenticeship and training.

(4) "Bona fide resident of Montana" is defined at 18-2-401, MCA.

(5) "Commissioner" means the commissioner of labor and industry, as provided by 2-15-1701, MCA.

(6) "Certified payroll records" mean payroll records of an employer which show the rates and hours paid and any deductions therefrom, made by the employer on a public works contract job and which have been verified by or on behalf of the employer as being complete and accurate.

(7) "Complaint" means:

(a) a written complaint alleging non-payment of the standard prevailing wage on a public works contract job;

(b) a written request for an audit of an employer's payroll on a public works contract job; or

(c) a field investigation by the department of an employer's payroll on a public works contract job.

(8) "Day" means a calendar day.

(9) "Department" means the department of labor and industry, as provided by 2-15-1701, MCA.

(10) "Determination" means a decision by the department which states the amount of wages and penalty (if any) that may be owed for labor performed on a public works contract job.

(11) "District" means a prevailing wage district as established under 18-2-411, MCA.

(12) "Employ" has the same meaning as provided by 39-3-201, MCA.

(13) "Employee" has the same meaning as provided by 39-3-201, MCA, and includes any laborer, mechanic, skilled, unskilled and semiskilled laborer and apprentices employed by a contractor, subcontractor or employer and engaged in the performance of services directly upon or immediately adjacent to the job site. The term does not include material suppliers or their employees who do not perform services at the job site.

(14) "Employer" has the same meaning as provided by 39-3-201, MCA, and includes contractors and subcontractors.

(15) "Formal hearing" means a contested case, held by a department hearing officer, pursuant to Title 2, chapter 4, part 6, MCA.

(16) "Penalty" means the statutory penalty provided by 18-2-407, MCA, which is assessed by the department against the employer and which is paid to the employee in addition to the wages owed.

(17) "Public contracting agency" includes:

(a) the state of Montana or any political subdivision thereof;

(b) the Montana university system;

(c) any local government or political subdivision thereof;

(d) school districts, irrigation districts, or other public authorities organized under the laws of the state of Montana; or

(e) any board, council, commission, trustees or other public body acting as or on behalf of a public agency.

(18) "Prevailing wage" or "standard prevailing rate of wages" means the standard prevailing rate of wages, as provided by 18-2-401, MCA, and as adopted by the department for work on public works contracts. The standard prevailing rate of wages determined according to these rules is not a prescribed wage rate, but is rather a minimum, at or above which an individual performing labor on a public works project must be compensated.

(19) "Redetermination" means an informal review by the department, based upon new or additional information supplied by a party who has received an adverse determination.

(20) "Wages" have the same meaning as provided by 18-2-401, 18-2-412, and 39-3-201, MCA.

Rules 24.17.104 through 24.17.106 reserved

24.17.107 PREVAILING WAGE DISTRICTS ESTABLISHED

(1) Pursuant to 18-2-411, MCA, the commissioner has established 10 districts for the purpose of setting the standard prevailing rate of wages for construction services (other than heavy construction or highway construction) and non-construction services. Heavy construction and highway construction rates are set on a state-wide basis, as provided by 18-2-411, MCA.

(2) The districts are composed of the following counties:

(a) District 1: Flathead, Lake, Lincoln, and Sanders;

(b) District 2: Mineral, Missoula, and Ravalli;

(c) District 3: Beaverhead, Deer Lodge, Granite, Madison, Powell, and Silver Bow;

(d) District 4: Blaine, Cascade, Choteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole;

(e) District 5: Broadwater, Jefferson, Lewis and Clark, and Meagher;

(f) District 6: Gallatin, Park, and Sweet Grass;

(g) District 7: Fergus, Golden Valley, Judith Basin, Musselshell, Petroleum, and Wheatland;

(h) District 8: Big Horn, Carbon, Rosebud, Stillwater, Treasure, and Yellowstone;

(i) District 9: Daniels, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, and Valley;

(j) District 10: Carter, Custer, Dawson, Fallon, Prairie, Powder River, and Wibaux.

Rules 24.17.108 through 24.17.120 reserved

24.17.121 ESTABLISHING THE STANDARD PREVAILING RATE OF WAGES AND FRINGE BENEFITS

(1) The commissioner shall establish the standard prevailing rate of wages and fringe benefits for the various occupations in each district. Except as used in (2) and (3), the term "prevailing rate of wages" includes both wages and fringe benefits.

(2) Based on survey data collected by the department for each district, the commissioner will compile wage rate information for a given occupation that reflects wage rates actually paid to workers engaged in public works or commercial projects. The department will survey those construction contractors who appear on a list of contractors registered pursuant to Title 39, chapter 9, MCA, as of October 22 of that year, with respect to those workers performing work according to commercial building codes. Wage rates for each occupation will be set using the following procedure:

(a) If a minimum of five or more workers is reported for the occupation within the district, and 50% or more of those workers receive the same wage, that rate is the district prevailing wage rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing wage rate cannot exceed the collectively bargained wage rate.

(b) If five or more workers are reported for the occupation within the district, but 50% of those workers are not paid the same

rate, the weighted average wage rate, weighted by the number of workers, is the district prevailing wage rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing wage rate cannot exceed the collectively bargained wage rate.

(c) If less than five workers are reported for the occupation within the district, the district prevailing wage rate is the collectively bargained rate for that occupation in that district.

(d) If a collective bargaining agreement does not exist for the occupation in that district, a weighted average wage rate for the district weighted by number of workers will be computed using data submitted from all contiguous districts. Districts and their contiguous districts are as follows:

(i) District 1 (Flathead, Lincoln, Sanders, Lake counties): districts 2, 3, 4, and 5.

(ii) District 2 (Missoula, Ravalli, and Mineral counties): districts 1 and 3.

(iii) District 3 (Granite, Powell, Deer Lodge, Silver Bow, Madison, and Beaverhead counties): districts 1, 2, 5, and 6.

(iv) District 4 (Cascade, Choteau, Toole, Liberty, Glacier, Pondera, Teton, Hill, and Blaine counties): districts 1, 5, 7, and 9.

(v) District 5 (Lewis and Clark, Broadwater, Meagher, and Jefferson counties): districts 1, 3, 4, 6, and 7.

(vi) District 6 (Gallatin, Park, and Sweet Grass counties): districts 3, 5, 7, and 8.

(vii) District 7 (Wheatland, Fergus, Musselshell, Petroleum, Golden Valley, and Judith Basin counties): districts 4, 5, 6, 8, and 9.

(viii) District 8 (Stillwater, Yellowstone, Rosebud, Treasure, Big Horn, and Carbon counties): districts 6, 7, 9, and 10.

(ix) District 9 (Valley, Phillips, Sheridan, Daniels, Garfield, McCone, Richland, and Roosevelt counties): districts 4, 7, 8, and 10.

(x) District 10 (Carter, Wibaux, Dawson, Fallon, Prairie, Custer, and Powder River counties): districts 8 and 9.

(e) If contiguous district data do not sum to a minimum of five workers, a statewide weighted average wage rate will be calculated for the occupation.

(f) If a minimum of five workers is not reported for the occupation in the entire state, no rate will be established for that occupation.

(3) Based on survey data collected by the department of labor and industry, for each district, the commissioner will compile fringe benefit information for a given occupation by district that reflects fringe benefits actually paid to workers engaged in public works or commercial projects. The department will survey those construction contractors who appear on a list of contractors registered pursuant to Title 39, chapter 9, MCA, as of October 22 of that year, with respect to those workers performing work

according to commercial building codes. A single fringe benefit rate for each occupation will be set for bona fide benefits paid or contributed to approved plans, funds or programs for health insurance, life insurance, pension or retirement, vacations, holidays and sick leave, using the following procedure:

(a) If a minimum of five or more workers is reported for the occupation within the district, and 50% or more of those workers receive the same dollar value of fringe benefits, that rate is the district prevailing fringe benefit rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing fringe benefit rate cannot exceed the collectively bargained rate.

(b) If five or more workers are reported for the occupation within the district, but 50% of those workers are not paid the same fringe benefit rate, the weighted average fringe benefit rate, weighted by the number of workers, is the district prevailing fringe benefit rate, provided that the rate does not exceed the collectively bargained rate for that occupation in that district. As provided by 18-2-402, MCA, the prevailing fringe benefit rate cannot exceed the collectively bargained rate.

(c) If less than five workers are reported for the occupation within the district, the district prevailing fringe benefit rate is the collectively bargained fringe benefit rate for that occupation in that district.

(d) If a collective bargaining agreement does not exist for the occupation in that district, but a minimum of five workers are reported in the combined contiguous districts, a weighted average fringe benefit rate for the district, weighted by the number of workers, will be computed using data submitted from all contiguous districts. Districts and their contiguous districts are the same as provided by (2)(d) of this rule.

(e) If contiguous district fringe benefit data do not sum to a minimum of five workers, statewide weighted average fringe benefit rates will be calculated for the occupation.

(f) If a minimum of five workers are not reported for the occupation in the entire state, no fringe benefit rate will be established for that occupation.

(4) The commissioner may request clarification, additional information or independent verification of information submitted pursuant to this rule.

(5) The commissioner will annually incorporate the federal Davis-Bacon Act wage rates established for Montana as the state heavy and highway construction rates. Building construction services prevailing wage rates will be updated annually, and nonconstruction services will be updated in odd-numbered years.

(6) In the event of an incorrect prevailing wage rate being published, the commissioner will review additional data submitted to determine that the rate is incorrect. If found to be incorrect, the prevailing wage rate will revert to the last published rate that was adopted via the rulemaking and public hearing process. For temporary rates which have not been adopted via the rulemaking and the public hearing process, an amended rate will be calculated

based on information collected and submitted.

(7) It is the obligation of any person having possession or knowledge of wage rate information, including collective bargaining agreements that the commissioner should consider, or it is desired that the commissioner consider, to timely deliver such information to the commissioner.

(8) Wage information may be considered by the commissioner only if such information is delivered to the Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728, within the time set by the commissioner.

(9) Within each district, the commissioner considers current wage rate information on file and sets the standard prevailing rate of wages for each craft, trade, occupation, or type of workers. Except as provided in (2), all rates shall be adopted in accordance with ARM 24.17.127.

Rules 24.17.122 and 24.17.123 reserved

24.17.124 DEPARTMENT ASSISTANCE AND NEW JOB CLASSIFICATION RATES (1) Assistance in determining the nature of public works projects and whether heavy, highway or building construction prevailing wage rates apply, can be obtained through the office of the commissioner of labor and industry. Any determination or assistance provided by the commissioner's office is based solely on the facts as presented to the commissioner in the specific request for assistance.

(2) If the commissioner receives a written request for a rate that does not exist for a particular craft, trade, or occupation, the commissioner may set an interim advisory rate that may be used by the public contracting agency or public contractor until the rate is published in accordance with ARM 24.17.127. Such rates will not be established more frequently than once every three months.

(3) At least 30 days prior to advertising for bids or letting a contract for a public works project, a public contracting agency may request that a new job classification and commensurate rate of wages and fringe benefits be established for a particular craft, classification or type of worker needed for a project. The commissioner will establish a standard prevailing rate of wages for any craft, classification or type of worker for which no rate has been previously determined.

(4) A request for a new project job classification and commensurate rate of wages and benefits does not relieve a contractor from the obligation to classify and pay workers in accordance with annually established standard prevailing wage rates pending the establishment of a new job classification and wage rates.

(5) A request for a new job classification and rate of wages shall include:

(a) identification of the project by name, number or description and location;

(b) the name and address of the public contracting agency and

the successful public contractor if a contract for work on the project has been awarded;

(c) the name, address and signature of the requesting party, and the name, address and signature of a requesting party's representative;

(d) each proposed job classification and rate of wages requested;

(e) a brief description of the project and the character of the work to be performed;

(f) a detailed description of the job requirements, work to be performed and skills involved in each proposed job classification;

(g) an explanation as to why none of the classifications established for the standard prevailing rate of wages is applicable;

(h) any written items of information or documents the requesting party desires to be considered;

(i) the names and addresses of all parties entitled to notice and a signed and dated certificate showing that a copy of the request was mailed to each.

(6) A request for a new job classification and rate of wages must establish:

(a) that the project is of such an unusual character that its performance requires unique skills not traditionally performed by any craft classification or type of worker for which there has been established a standard prevailing rate of wages;

(b) that there exists a classification of workers who commonly perform work involving such unique skills at the proposed rate of wages.

Rules 24.17.125 and 24.17.126 reserved

#### 24.17.127 ADOPTION OF STANDARD PREVAILING RATE OF WAGES

(1) The commissioner's determination of minimum wage rates, including fringe benefits for health and welfare, pension contributions and travel allowance, by craft, classification or type of worker, and by character of project, are adopted in accordance with the Montana Administrative Procedure Act and rules implementing such act.

(a) A notice of proposed adoption of the commissioner's determination is published in the Montana Administrative Register 30 to 45 days prior to adoption according to regular publication dates scheduled in ARM 1.2.419.

(b) Adopted wage rates are effective until superseded and replaced by a subsequent adoption.

(c) The wage rates applicable to a particular public works project are those in effect at the time the bid specifications are advertised.

(d) The wage rates proposed and the wage rates adopted are

incorporated by reference in respective notices published in the Montana Administrative Register.

(e) The current building construction services rates are contained in the 2002 version of "The State of Montana Prevailing Wage Rates - Building Construction Services" publication.

(f) The current non-construction services rates are contained in the 2001 version of "The State of Montana Prevailing Wage Rates - Service Occupations" publication.

(g) The current heavy and highway construction services rates are contained in the 2002 version of "The State of Montana Prevailing Wage Rates - Heavy and Highway Construction Services" publication.

(2) The commissioner maintains a mailing list of interested persons and agencies. A copy of any notice, proposed rate of wages, adopted rates, wages or other information are distributed to each addressee. All others may obtain a copy or be included on the mailing list upon request to the Office of Research and Analysis, Workforce Services Division, Department of Labor and Industry, 840 Helena Avenue, Helena, MT 59601. Copies of adopted wage rates are available at reproduction cost for a period of five years following their effective date.

(3) The standard prevailing rates of wages are hereby adopted and incorporated by reference. Copies of the rates are available upon request from the Office of Research and Analysis, Workforce Services Division, Department of Labor and Industry, 840 Helena Avenue, Helena, MT 59601, (406) 444-2430.

Rules 24.17.128 through 24.17.140 reserved

24.17.141 OBLIGATIONS OF PARTIES REGARDING THE PAYMENT OF PREVAILING WAGES (1) Montana law requires payment of the standard prevailing rate of wages on public works contracts. Public contracting agencies, contractors, and subcontractors and employers each have a role in complying with the prevailing wage laws.

(2) Assistance in determining the nature of public works projects and whether heavy, highway or building construction prevailing wage rates apply, can be obtained through the office of the commissioner of labor and industry. Any determination or assistance provided by the commissioner's office is based solely on the facts as presented to the commissioner in the specific request for assistance.

(3) Pursuant to 18-2-422, MCA, a public contracting agency is obligated to include in its bid specifications and public works contracts a provision that the contractors, subcontractors and employers must pay the standard prevailing rate of wages in the performance of the public works contract, and specify what those rates are. As provided in 18-2-403, MCA, the failure of the public contracting agency to include such provisions subjects the public contracting agency to liability



for any underpaid wages owed by any contractor, subcontractor or employer for the performance of the public works contract.

(4) Pursuant to 18-2-403, MCA, if the public contracting agency includes the required provisions regarding payment of the standard prevailing rate of wages, the contractor, subcontractor or employer that signs the contract with the public contracting agency is obligated to ensure that the appropriate standard prevailing rate of wages is paid to each employee performing construction services in performance of the public works contract, and is liable for any underpaid wages or fringe benefits.

(5) As provided in 18-2-406, MCA, each contractor, subcontractor or employer must post the wage scale to be paid for work done in performance of the public works contract in a prominent and accessible site on the project or work area from the first day of work and continued for the duration of the project. Failure to pay at least the standard prevailing rate of wages subjects each contractor, subcontractor or employer to penalties and fees as provided by law.

(6) In order to ensure compliance with Montana's prevailing wage laws, public contracting agencies, contractors, subcontractors and employers may enter into contractual agreements that specify that each contractor, subcontractor or employer working on the public works contract has an obligation to ensure that any person, firm or entity performing any portion of the public works contract for which the contractor, subcontractor or employer is responsible, is paid the applicable standard prevailing rate of wages. The terms of the contract may include a provision for the indemnification of a party that is required to pay underpaid wages on behalf of any other person, firm or entity that failed to properly pay the required prevailing wage.

(7) The failure of a contractor, subcontractor or employer to comply with the provisions of 18-2-412, MCA, regarding the acceptable alternative methods of paying the standard prevailing rate of wages, may subject that party to penalties as provided by law and damages or obligations as specified by contract.

Rules 24.17.142 and 24.17.143 reserved

#### 24.17.144 OBLIGATIONS OF PUBLIC CONTRACTING AGENCIES

(1) A public contracting agency must include in the bid specifications and contracts for any public works the following:

(a) An unequivocal agreement by the contractor to give preference to employment of bona fide Montana residents in compliance with 18-2-403(1), MCA. For any construction project, excluding projects involving the expenditure of federal aid funds or where residency preference laws are specifically prohibited by federal law, the bid specifications and the contract shall provide that at least 50% of the workers (including workers employed by subcontractors) will be bona fide Montana residents

in compliance with 18-2-403(1) and 18-2-409, MCA. In the case of a particular contractor such percentage of Montana residents shall be modified to comply with any written directive by the commissioner specifying a different percentage.

(b) An unequivocal agreement by the contractor that a worker (including workers employed by a subcontractor) performing labor on the project will be paid the applicable standard prevailing rate of wages as determined by the commissioner.

(c) A listing of standard prevailing wage rates including fringe benefits determined by the commissioner applicable to the public works contract.

(d) The contract provisions must clearly show that the contractor and its subcontractors are bound to pay wages at rates determined by the commissioner, and to give required preferences.

(2) If a contract for public works is to be performed in more than one district where a different standard prevailing rate of wages is established for a particular craft, classification or type of worker, the highest rate is the rate to be included in the bid specifications and contract provision.

(3) Whenever a public works project is accepted by a public contracting agency, the agency shall promptly send to the department a notice of acceptance and the completion date of the project. This notice is required only if the public works project is covered by the Act.

(4) If a public contracting agency fails to comply with the requirements of this rule, the obligation to pay the standard prevailing rate of wages will be placed on the public contracting agency and the contractor may be relieved of such obligation.

Rules 24.17.145 and 24.27.246 reserved

24.17.147 OBLIGATIONS OF EMPLOYERS, CONTRACTORS AND SUBCONTRACTORS (1) All contractors and subcontractors shall give preference in hiring to bona fide Montana residents in the performance of public works contracts.

(a) In the performance of a public works contract for a construction project, a contractor, subcontractor or employer shall ensure that at least 50% of all workers performing labor under the contract for public works are bona fide Montana residents.

(b) For cause as provided in 18-2-409, MCA, a contractor, subcontractor or employer may in writing request that the commissioner modify percentage residency requirements on a particular project. In requesting the variance, the contractor, subcontractor or employer must document in writing any and all measures taken in assessing the availability of bona fide Montana employees including, but not limited to, contacting local job service offices, newspaper advertising, and contacting local union halls, temporary or personnel agencies. The commissioner may modify or waive residency requirements under the provision of the statute and shall by written directive notify the contracting agency of any such modification or waiver.

(2) All contractors, subcontractors and employers shall classify each employee who performs labor on a public works project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each such employee a rate of wages not less than the standard prevailing rate.

Rules 24.17.148 through 24.17.160 reserved

24.17.161 DIVIDING PROJECTS PROHIBITED (1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance.

(2) When making a determination of whether the public agency divided a contract to avoid compliance, the commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

(a) the physical separation of project structures;

(b) whether a single public works project includes several types of improvements or structures;

(c) the anticipated outcome of the particular improvements or structures the agency plans to fund;

(d) whether the structures or improvements are similar to one another and combine to form a single, logical entity having one overall purpose or function;

(e) whether the work on the project is performed in one time period or in several phases as components of a larger entity;

(f) whether a contractor, subcontractor or employer and their employees are the same or substantially the same throughout the particular project;

(g) the manner in which the public contracting agency and the contractors, subcontractors or employers administer and implement the project; and

(h) other relevant matters as may arise in any particular case.

(3) When the commissioner determines that a public contracting agency has divided a public works project to avoid compliance, the commissioner shall issue an order compelling compliance. The order shall be written and shall offer the public contracting agency the opportunity to contest the order.

Rules 24.17.162 through 24.17.170 reserved

24.17.171 APPRENTICES (1) Apprentices are those persons employed and individually registered in bona fide apprenticeship programs registered with or recognized by the department's bureau of apprenticeship and training or the U.S. bureau of apprenticeship and training.

(2) An employer is limited in the number of apprentices permitted on the job site for any class or type of employee based on the allowable ratio of apprentices to journeymen specified in the approved program. This requirement applies to the work site

unless otherwise stated.

(3) An apprentice must register 30 days prior to the date the apprentice starts work on the project. An apprenticeship ratio is determined on a daily basis for each work week, based on the number of journeymen employed on site. Any employee who is not registered or otherwise employed as stated in this rule, shall be paid not less than the applicable wage rate on the wage determination for the class or type of work actually performed. If an employer exceeds or has exceeded the allowable ratio of apprentices to journey-level workers, the apprentice(s) who has the earliest starting date on the public works project is the apprentice who may be paid the percentage of pay specified in the apprenticeship agreement. If the records kept by the employer do not identify which apprentice started on which date, in the event the ratio is exceeded on any given day, all of the employer's apprentices working on the public works project must be paid the prevailing wage for that work week. In the event the Montana apprenticeship and training registration agency or the U.S. bureau of apprenticeship and training withdraws approval of an apprenticeship program, or deems the program to be out of compliance, the contractor, subcontractor or employer shall no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the class or type of work performed until determined in compliance or an acceptable program is approved.

## **Subchapter 2 Reserved**

### **Subchapter 3 Records And Payments**

24.17.301      REQUIRED RECORDS      (1)      All contractors, subcontractors or employers performing work on public works contracts shall make and maintain for a period of three years from the completion of work upon such public works projects, records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to employees upon public works projects.

(2) In addition to the certification required by ARM 24.17.307, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid must include, but are not limited to, records of:

(a) the name, address, and social security number of each employee;

(b) the work classification or craft of each employee;

(c) the rate or rates of monetary wages and fringe benefits paid to each employee, including:

(i) the amount of payment (if any) for travel expenses;

(ii) the amount of payment (if any) for per diem expenses;

(iii) the amount of payment (if any) for other reimbursed expenses; and

(iv) the fair market value of any other benefits provided to the employee by the employer, such as allowing personal use of a

company vehicle by the employee and the value of meals and lodging directly furnished by the employer;

(d) the rate or rates of fringe benefits payments made in lieu of those required to be provided to each employee;

(e) total daily and weekly compensation paid to each employee;

(f) the daily and weekly hours worked by each employee, specified by actual calendar date; and if the employee worked in more than one craft or classification for which different rates were payable, the records shall show the number of hours in each day worked at the different crafts or classifications;

(g) apprenticeship and training agreements and standards;

(h) any deduction, rebates or refunds taken from each employee's total compensation and actual wages paid; and

(i) any payroll and other records pertaining to the employment of employees on a public works project.

(3) When apprentices are employed on a public works project, the records must clearly distinguish them from other employees. The records must also clearly identify the date each apprentice started working on the public works project and must include verification of apprenticeship registration.

(4) When a contractor, subcontractor or employer employs an employee on public works projects and non-public works projects during the same work week and the employee is paid a rate of pay which is less than the prevailing wage rate when working on a non-public works project, the employer must separately record the hours worked on the public works contract projects and those hours worked elsewhere.

Rules 24.17.302 and 24.17.303 reserved

24.17.304 RECORDS AVAILABILITY (1) Every employer (including a contractor or subcontractor) performing work on a public works project shall make available to the department records necessary to determine if the prevailing wage rate has been or is being paid to employees on the public works project. Such records shall be made available for inspection and transcription within 72 hours of an on-site inspection, within five days of a mail-in request or at such later time as may be specified by the department.

Rules 24.17.305 and 24.17.306 reserved

24.17.307 PAYROLL CERTIFICATION (1) When a prevailing wage complaint has been filed with the department or when the department has otherwise received evidence indicating that a violation has occurred, or when the department undertakes an audit, the department shall send a letter requesting copies of the contractor, subcontractor or employer's payroll records. The records requested will include those enumerated in ARM 24.17.301, and shall be forwarded to the department within five days. Included with the records must be a statement with respect to the wages paid each

employee. This statement shall be executed by the contractor, subcontractor, employer or by an authorized officer or employee of the contractor, subcontractor or employer who supervises the payment of wages, and shall certify the payroll records, or copies thereof, are true and accurate and reflect all payments and deductions made for employees employed on the public works project for each week.

Rules 24.17.308 through 24.17.310 reserved

24.17.311 FULL PAYMENT REQUIRED (1) Each contractor, subcontractor or employer shall pay each employee not less than the prevailing wage rate required unconditionally, without subsequent rebate, and except as provided in (2), without deductions for:

- (a) meals;
- (b) lodging;
- (c) transportation; or
- (d) use of small tools.

(2) A contractor, subcontractor or employer may make deductions if such deductions are in a form prescribed by the commissioner and consistent with federal WH-347 payroll form available at [www.dol.gov](http://www.dol.gov) and are either:

- (a) required by law;
- (b) required or allowed by a collective bargaining agreement between a bona fide labor organization and the contractor, subcontractor or employer; or
- (c) expressed in a written or oral agreement carried out in practice or in fact and mutually understood between an employee and an employer and undertaken at the beginning of employment. Such an agreement must concern the fair market value of other benefits provided to the employee by the employer such as meals and lodging directly furnished by the employer, employee use of company vehicles, or other similar items not regularly or customarily provided.

Rules 24.17.312 through 24.17.315 reserved

24.17.316 WAGE AVERAGING PROHIBITED (1) A contractor, subcontractor or employer may not reduce an employee's regular rate of pay for work on projects not subject to the prevailing wage rate laws when the reduction in pay has the effect of the employee not receiving the prevailing rate of wage for work performed on the public works project.

(2) As used in this rule, "regular rate" has the same meaning as that defined in ARM 24.16.2512.

(3) When making a determination of whether a contractor, subcontractor or employer has reduced an employee's regular rate in violation of (1) of this rule, the department shall consider:

- (a) the timing of the wage rate reduction;
- (b) whether the wage rate reduction was made pursuant to an established plan;
- (c) whether the wage rate reduction is applied equally to all

employees in similar job classifications;

(d) whether the wage rate reductions are applied to employees employed on public works projects, but not to employees employed only on projects not subject to the prevailing wage rate laws; and

(e) other considerations as the facts and circumstances of a particular matter may reveal.

Rules 24.17.317 through 24.17.320 reserved

24.17.321 PAYMENT OF FRINGE BENEFITS (1) All contractors, subcontractors and employers that are required to pay employees the prevailing rate of wages must pay no less than the hourly rate of pay and fringe benefits as determined by the commissioner.

(2) Apprentices must be paid the percentage of the basic hourly rate required, based on the total time in the craft, and/or fringe benefits specified in the employers' registered apprenticeship standards. If the apprentice performs labor which is subject to a higher wage rate either by contract or by law than that specified in the apprenticeship standards, the higher wage rate shall be paid by the contractor, subcontractor or employer. If the standards are silent on the payment of fringes, the apprentice is to receive the full amount of the fringe benefits stipulated on the wage decision.

(3) The provisions of this rule are met when the amount of the fringe benefit or benefits is paid to the employee, in cash, or irrevocable contributions are made to a trustee or a third party administering a fringe benefit or benefits program.

(4) When a contractor, subcontractor or employer pays an hourly rate of pay which exceeds that determined by the commissioner, the amount by which the rate is exceeded may be credited toward payment of the amount of fringe benefits determined by the commissioner for the trade or occupation.

(5) When a contractor, subcontractor or employer pays a rate for any one fringe benefit which exceeds that which is determined for the fringe benefit, the amount by which the rate is exceeded may be credited toward payment of the amount to be paid for all fringe benefits as determined by the commissioner for the trade or occupation.

(6) When a contractor, subcontractor or employer pays an amount for fringe benefits which exceeds the amount of fringe benefits established by the commissioner, the excess amount may be credited towards the hourly rate of pay. In order for the credit to apply, the contractor, subcontractor or employer must have the amount paid for fringe benefits separately identified as required by ARM 24.17.301(2).

(7) Contributions to fringe benefit plans must be made not less than quarterly.

Rules 24.17.322 through 24.17.325 reserved

24.17.326 OVERTIME WAGES COMPUTATIONS (1) Where an employee performs work in one or more classifications which provide for one

or more hourly rates of pay, the employee must be paid, in addition to the straight time hourly earnings for all hours worked, a sum determined by multiplying one half the weighted average of the hourly rates by the number of hours worked in excess of 40 per week.

(2) Fringe benefits must be paid for all hours worked, including the overtime hours. When determining the hourly wage rate for overtime purposes, the amount paid for fringe benefits shall be excluded from the computations when determining the overtime rate. For example, an employee who earns \$15 per hour plus \$3 per hour in fringe benefits and works 42 hours in a week is entitled to \$600 (\$15/hr x 40 hours) + \$45 (\$22.50/hr x 2 hours) + \$126 (\$3/hr x 42 hours) = \$771 for that week.

#### **Subchapter 4 Reserved**

#### **Subchapter 5 Construction Services**

24.17.501 PUBLIC WORKS CONTRACTS FOR CONSTRUCTION SERVICES SUBJECT TO PREVAILING RATES (1) Public works contracts for construction services where the total contract price is more than \$25,000 are subject to standard prevailing wage requirements, and include building construction, heavy construction, and highway construction.

(2) Building construction projects generally are the constructions of sheltered enclosures with walk-in access for housing persons, machinery, equipment, or supplies. It includes all construction of such structures, incidental installation of utilities and equipment, both above and below grade level, as well as incidental grading, utilities and paving.

(a) Examples of building construction include, but are not limited to, alterations and additions to buildings, apartment buildings (5 stories and above), arenas (closed), auditoriums, automobile parking garages, banks and financial buildings, barracks, churches, city halls, civic centers, commercial buildings, court houses, detention facilities, dormitories, farm buildings, fire stations, hospitals, hotels, industrial buildings, institutional buildings, libraries, mausoleums, motels, museums, nursing and convalescent facilities, office buildings, out-patient clinics, passenger and freight terminal buildings, police stations, post offices, power plants, prefabricated buildings, remodeling buildings, renovating buildings, repairing buildings, restaurants, schools, service stations, shopping centers, stores, subway stations, theaters, warehouses, water and sewage treatment plants (buildings only), etc.

(b) Projects involving the construction, alteration, or repair of single family individual dwelling units, houses, or apartment buildings of not more than four stories in height and consisting of not more than eight living units, are not subject to the prevailing wage rates.



(3) Highway construction projects include, but are not limited to, the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, and parking areas, bridges constructed or repaired in conjunction with highway work, and other similar projects not incidental to building construction or heavy construction.

(a) Highway construction projects include, but are not limited to, alleys, base courses, bituminous treatments, bridle paths, concrete pavement, curbs, excavation and embankment (for road construction), fencing (highway), grade crossing elimination (overpasses or underpasses), guard rails on highways, highway signs, highway bridges (overpasses, underpasses, grade separation), medians, parking lots, parkways, resurfacing streets and highways, roadbeds, roadways, runways, shoulders, stabilizing courses, storm sewers incidental to road construction, street paving, surface courses, taxiways, and trails.

(4) Heavy construction projects include, but are not limited to, those projects that are not properly classified as either "building construction", or "highway construction."

(a) Heavy construction projects include, but are not limited to, antenna towers, bridges (major bridges designed for commercial navigation), breakwaters, caissons (other than building or highway), canals, channels, channel cut-offs, chemical complexes or facilities (other than buildings), cofferdams, coke ovens, dams, demolition (not incidental to construction), dikes, docks, drainage projects, dredging projects, electrification projects (outdoor), fish hatcheries, flood control projects, industrial incinerators (other than building), irrigation projects, jetties, kilns, land drainage (not incidental to other construction), land leveling (not incidental to other construction), land reclamation, levees, locks and waterways, oil refineries (other than buildings), pipe lines, ponds, pumping stations (prefabricated drop-in units-not buildings), railroad construction, reservoirs, revetments, sewage collection and disposal lines, sewers (sanitary, storm, etc.), shoreline maintenance, ski tows, storage tanks, swimming pools (outdoor), subways (other than buildings), tipples, tunnels, unsheltered piers and wharves, viaducts (other than highway), water mains, waterway construction, water supply lines (not incidental to building), water and sewage treatment plants (other than buildings) and wells.

Rules 24.17.502 through 24.17.510 reserved

24.17.511 COMMERCIAL SUPPLIER DEFINED (1) As used in this chapter, the term "commercial supplier" means a person, firm or entity that regularly furnishes goods and supplies to the public or to a particular sector or industry. The term includes both retail and wholesale operations, but does not include a person, firm or entity that limits its sales or production output from any single source or place of operation for use solely in the performance of public works contracts.

(2) As used in this rule, the term "goods and supplies" means

tangible items, materials or commodities that are produced or manufactured for use or incorporation in construction projects. The term includes both items that are produced or manufactured to a standard size, grade or dimension, as well as items that are specially manufactured or produced on a "to order" or "made to measure" basis.

Rules 24.17.512 and 24.17.513 reserved

24.17.514 COMMERCIAL SUPPLIERS NOT SUBJECT TO PREVAILING WAGE LAWS (1) A commercial supplier of goods and supplies is not subject to Montana's prevailing wage laws unless that supplier acts as a construction contractor, subcontractor or employer on the public works contract by performing on-site labor.

(2) Employees of a commercial supplier who are engaged in the performance of services directly upon the job site must be paid the applicable prevailing wage rate for the classification of work performed.

(3) For the purposes of this rule, the term "construction work" means labor that is performed after the commercial supplier delivers the goods or supplies. The fact that a commercial supplier charges for delivery (based on distance from the commercial supplier's location to the job site) does not transform the delivery into "construction work".

(a) As an example, the dumping of gravel from a belly-dump trailer, even if the dumping is done in a long row, is considered to be part of the delivery of the gravel. However, if the driver of the delivery vehicle performs "shovel work" after the load is dumped, that "shovel work" is considered to be "construction work".

(b) As another example, ready-mixed concrete is delivered by a commercial supplier from the mixer truck to a particular location on the job site. The mixer truck operator is delivering the concrete when the operator directs the flow of concrete down the delivery chute that is attached to the mixer truck, even if that flow is directed into a form that has been assembled by others in place. Further movement or manipulation of the concrete, after it leaves the end of the delivery chute, such as distributing the concrete evenly in the form with a shovel or screeding the concrete, constitutes "construction work".

(c) As another example, a commercial supplier delivers road oil to a public works contract site in a tank truck. The transfer of the road oil from the tank truck to a storage tank or into a road oiler truck is considered to be delivery within the meaning of this rule. However, if the supplier's tank truck also sprays the road oil directly on the road surface, that spraying operation is considered to be "construction work" for which the prevailing rate of wages must be paid.

(d) As another example, a commercial supplier of cabinets is not engaging in "construction work" by delivering the cabinets to a particular location or locations in a building that is being constructed pursuant to a public works contract. However, any installation work done to attach the cabinets to the building, or

work performed after the cabinets are attached to the building, constitutes "construction work" within the meaning of this rule.

Rules 24.17.515 through 24.17.520 reserved

24.17.521 CLASSIFYING EMPLOYEES FOR CONSTRUCTION SERVICES

(1) All employers on public works contracts for construction services (including contractors and subcontractors) shall classify each employee who performs labor on a public works contract project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each employee a rate of wages not less than the standard prevailing rate. In instances where an employee performs duties and tasks associated with other crafts for 30 minutes or less per day, the employee would still receive the appropriate rate of wages established for the employee's primary craft classification.

Rules 24.17.522 through 24.17.525 reserved

24.17.526 PROJECTS OF A MIXED NATURE (1) Prevailing wage projects will use either the heavy, highway, or building construction prevailing wage rates. In certain cases, multiple wage schedules should be included in the bid document.

(2) A guideline referred to as the "20% test" can generally be followed to determine when the heavy, highway, or building construction prevailing wage rates should be used for construction contracts.

(a) This guideline is applied when, for example, a project is principally a contract for heavy or highway construction, but building construction is a "significant component" of the project (where the budget for building construction exceeds 20% of the total anticipated construction contract amount). The project engineer should then include both the heavy or highway construction rates and building construction rates in the bid document.

(b) The same "20% test" concept would apply to a project which is principally a contract for building construction, but also includes more than 20% of the contract price for non-building construction activity. In such cases, the contract should include both the building construction rates and heavy or highway construction prevailing wage rates in the bid document.

(c) In a project of a mixed nature where the 20% guideline applies, a contractor may pay the higher of the rates (on a craft-by-craft basis) for all work performed under the contract. However, in a project of a mixed nature, the contractor is not required to pay at a rate higher than is applicable for the craft for the type of work being performed.

(3) Only one schedule of rates (either building construction, heavy construction or highway construction) is issued if a particular type of construction activity is merely "incidental" in comparison to the overall character of the entire project. For the purpose of this rule, "incidental" means that the work in question either constitutes less than 20% of the total contract price, or

the work in question costs less than \$1,000,000.

### **Subchapter 6 Non-construction Services**

Rules 24.17.601 through 24.17.613 reserved

#### **24.17.614 "SITE OF WORK" FOR NON-CONSTRUCTION SERVICES**

(1) Unlike construction services, which by their very nature are performed at a specific site of work, many non-construction services can be performed at the place of business of the public contracting agency or at the place of the contractor. The fact that non-construction services are rendered at locations away from the place of business of the governmental entity does not change the requirement that the prevailing wage must be paid under the contract.

(2) As an example, school hot lunches under a food service contract could be prepared at the kitchen of a school where the food is being served, or the food could be prepared at the caterer's own kitchen and transported to the school. Regardless of where the food is being prepared, however, the employees must be paid the prevailing wage.

Rules 24.17.615 through 24.17.620 reserved

#### **24.17.621 CLASSIFYING EMPLOYEES FOR NON-CONSTRUCTION SERVICES**

(1) All employers on public works contracts for non-construction services (including contractors and subcontractors) shall classify each employee who performs labor on a public works contract project according to the applicable standard prevailing rate of wages for such craft, classification or type of employee established by the commissioner, and shall pay each such employee a rate of wages not less than the standard prevailing rate.

(2) The prohibition against dividing projects so as to avoid payment of the prevailing wages, as provided in [NEW RULE VIII], is also applicable to public works contracts involving non-construction services.

### **Subchapter 7 Reserved**

### **Subchapter 8 Complaint Process**

Rules 24.17.801 through 24.17.813 reserved

**24.17.814 COMPUTATION OF TIME PERIODS** (1) In computing any period of time prescribed or allowed by these rules or any applicable statute, the day of the act, event, or default after which the designated time period begins to run is not to be included. The last day of the period so computed is to be

included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. A half holiday is not a holiday, but is considered as a regular day.

(2) For the purpose of these rules, an item sent to the department is timely if it is either postmarked or received by the department by not later than the last day of the time period.

(3) An item which does not have a postmark is considered received as of the date it is date-stamped by the department.

Rules 24.17.815 and 24.17.816 reserved

24.17.817 FACSIMILE FILINGS (1) Any document required or allowed to be filed with the department may be filed by means of a telephonic facsimile communication device (fax).

(2) Filings with the department by facsimile are subject to the following conditions:

(a) a filing must conform with all applicable rules, except that only one copy of a document need be filed by facsimile even when multiple copies otherwise would be required;

(b) if a document is received after 5:00 p.m. mountain time, the date of filing of that document, for purposes of these rules, will be the date of the next regular work day; and

(c) the original document and any copies must be received by the department within five days of the facsimile transmittal or the filing will not be recognized as timely.

(3) The failure, malfunction, or unavailability of facsimile equipment does not excuse a party from the requirements of timely filing.

Rules 24.17.818 through 24.17.820 reserved

24.17.821 FILING COMPLAINTS (1) Complaints may be filed whenever an employee allegedly has not received the prevailing wages and/or fringe benefits due. These wages can be, but are not limited to, health and welfare, pension, vacation, overtime, or regular wages.

(2) A complaint may be filed by:

(a) the employee;

(b) the estate of an employee;

(c) an authorized representative of the commissioner, on behalf of an employee or group of employees;

(d) an authorized representative of an employee, such as a union business agent; or

(e) other persons or entities who can demonstrate that they have a direct pecuniary interest in seeing that wages are properly paid on public works contracts. Such other persons or entities include, but are not limited to, competitors of the employer that unsuccessfully bid on the public works contract.

(3) A complaint must be reduced to writing on the form furnished by the commissioner or in a format acceptable to the commissioner and signed by the complaining party.

(4) Wage complaint forms can be obtained from the Labor Standards Bureau, Employment Relations Division, Department of Labor and Industry, 1805 Prospect Avenue, P.O. Box 6518, Helena, Montana 59624-6518. The telephone number is 406-444-5600.

(a) When requested by mail or telephone, the wage complaint form is mailed to the claimant by the department with a letter of instruction. The claim complaint must be filled out in detail, signed by the claimant and notarized. The form then must be returned to the labor standards bureau.

(5) Field investigations may be commenced by the commissioner without a complaint having been filed.

24.17.822 JURISDICTIONAL REVIEW (1) Upon receipt by the department of a complaint, the complaint is reviewed to decide jurisdictional coverage.

(a) If it appears the work is subject to federal prevailing wage laws, the complainant is advised to contact the U.S. department of labor.

(b) If it appears that state prevailing wage laws apply and not more than three years have elapsed since the alleged occurrence of improper payment, the process is continued.

(2) Information is obtained to decide if the job is exempt from prevailing wage requirements. If the job is exempt, the complainant is notified and the file is closed. If the job is not exempt, the complaint process is continued.

Rule 24.17.823 reserved

24.17.824 REQUESTING PARTY'S FAILURE TO PROVIDE INFORMATION

(1) If the party requesting the investigation fails to provide information requested by the department within time frames specified by the department, the department may dismiss the complaint.

Rules 24.17.825 and 24.17.826 reserved

24.17.827 EMPLOYER RESPONSE TO COMPLAINT (1) A complaint is commenced when a letter is mailed to the employer, contractor or subcontractor by the department notifying the employer, contractor or subcontractor of the complaint and requesting certified payroll records.

(2) A copy of the letter is sent to all parties involved in the complaint:

(a) the employee(s), if a wage complaint was filed;

(b) the prime contractor, if the complaint was filed against a subcontractor;

(c) the contracting agencies and their agent, if identified;

and

(d) the architect(s) or engineer(s) who prepared the bid specifications for the contracting agency.

(3) An employer must file a written response to the complaint. The response must be on either the form provided by the

department or presented in a similar format.

(4) To be timely, the employer's written response must be postmarked or delivered to the department by the date specified by the department. Upon timely request and for good cause shown, the department may allow additional time for response.

(5) Failure of the employer to timely respond to the complaint will result in the entry of a determination adverse to the employer.

Rule 24.17.828 reserved

24.17.829 DEPARTMENT REVIEW OF EMPLOYER RECORDS (1) If the employer complies and submits the requested records, they are examined to determine if a violation has occurred. The records are reviewed in accordance with ARM 24.17.301.

(2) In addition, the records are reviewed to determine if the employer has a fringe benefit fund, plan, or program and whether the fund, plan, or program meets the requirements of the Employee Retirement Income Security Act of 1974 or that such fund, plan, or program is approved by the U.S. department of labor.

(3) In addition, the records are reviewed to determine whether the employer has contributed with the trust fund or private insurance company the benefits being claimed.

(4) If an inspection of the records reveals no violation, a letter is sent to the employer advising that the records are in order, no violations have been found and the file is closed. A copy of the letter is sent to all parties involved.

(5) If an inspection of the information submitted by the employer reveals a violation, the investigation is continued.

Rule 24.17.830 reserved

24.17.831 DETERMINATION (1) Following the expiration of the period for an employer to respond to a complaint, the department will make a written determination of the wages and penalty owed, if any.

(2) A copy of the written determination will be mailed to each party involved with the complaint and attorneys of record at their last known address.

(3) A party who receives an adverse decision may request either a redetermination or a formal hearing. The request must be in writing and specify whether a redetermination or a hearing is requested.

Rules 24.17.832 and 24.17.833 reserved

24.17.834 REQUEST FOR REDETERMINATION (1) A party who has received an adverse decision may request a redetermination.

(2) The request for a redetermination must be made within 15 days of the date the determination is mailed. The request for a redetermination must be in writing and must include new or additional information relevant to the issue(s) in dispute which

the department is to consider.

(3) After receiving a timely request for a redetermination which includes new or additional information, the department will issue a written redetermination and mail a copy to the parties.

(4) The department will only issue one redetermination for each party who has received an adverse decision.

(5) If a request for a redetermination is not timely received, a default order will be issued. Any question as to whether the request is timely will be resolved upon judicial review.

Rules 24.17.835 and 24.17.836 reserved

24.17.837 REQUEST FOR FORMAL HEARING (1) A party who has received an adverse decision from a compliance specialist may request a formal hearing. The request for a formal hearing must be made within 15 days of the date either the determination or the redetermination is mailed to the party.

(2) A request must be in writing, mailed as specified in the adverse decision, and include the following:

- (a) the name and address of the requesting party;
- (b) the name and address of the opposing party; and
- (c) a statement that the party desires a hearing.

(3) Upon receiving a timely, written request for a formal hearing, the department will commence contested case proceedings. Any question as to whether the request is timely will be resolved upon judicial review.

24.17.838 MANDATORY, NONBINDING MEDIATION (1) If a formal hearing is requested, the parties are required to fully present their cases at a mediation, prior to the formal hearing.

(2) Such mediation shall be completed within 20 days of the request for formal hearing.

(3) The mediation process is mandatory, informal, held in private without a verbatim record and is confidential in nature. All communications and evidence from the mediation are confidential.

(4) The mediator, appointed by the department, will issue a report following the mediation process recommending a solution to the dispute. The mediator's report is without judicial or administrative authority and is not binding on the parties.

(5) Nothing in this rule precludes the parties from agreeing to pursue additional voluntary nonbinding mediation in an effort to resolve the dispute.

Rules 24.17.839 and 24.17.840 reserved

24.17.841 DEFAULT ORDERS AND DISMISSALS (1) A default order will be issued if the employer, contractor, subcontractor and/or the contracting agency fails to timely file a written response to the determination.

(2) The default order will specify the amount owed by the



employer, contractor, subcontractor or the contracting agency to the employee as wages and/or penalties.

(3) A dismissal will be issued if there is a finding of no merit to the complaint.

(4) Appeals of default orders and dismissals must be made in writing within 15 days of the date the default order or dismissal was mailed to the requesting party.

(5) Any question as to whether the appeal is timely will be resolved upon judicial review.

Rules 24.17.842 and 24.17.843 reserved

24.17.844 REQUEST FOR RELIEF IF MAIL IS NOT RECEIVED

(1) A party alleging that it did not receive timely notice by mail of the complaint, determination or hearing process provided by these rules has the burden of proving that the party should be granted relief. The party seeking relief must present clear and convincing evidence to rebut the statutory presumption that a letter duly directed and mailed was received in the regular course of the mail, as provided in 26-1-602, MCA.

(2) All questions regarding alleged non-receipt of mail, or whether a request for a redetermination, a formal hearing, or an appeal was timely made must be resolved upon judicial review.

(3) Once a judgment is issued by a district court concerning a decision, any request for relief must be directed to the district court by a party (not the department on behalf of a party) pursuant to the Rules of Civil Procedure and be in the form required by the district court.

Rules 24.17.845 and 24.17.846 reserved

24.17.847 APPEAL OF FORMAL HEARING (1) A party who has received an adverse decision may request an appeal. Appeal of a formal hearing order is made to district court.

(2) The time period in which to make an appeal is within 30 days of the date the decision of the hearing officer is mailed. The appeal must specifically identify the hearing officer's alleged error.

Rules 24.17.848 through 24.17.850 reserved

24.17.851 CRITERIA TO DETERMINE PENALTY AND COST IMPOSITION

(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor, or employer found in violation of the terms of the public works contract and shall cite the circumstances the commissioner finds to be applicable:

(a) the actions of the contractor, subcontractor or employer in response to previous violations, if any, of statutes and rules;

(b) prior violations, if any, of statutes and rules;

(c) the opportunity and degree of difficulty to comply;

(d) the magnitude and seriousness of the violation, including instances of aggravated or willful violation, or gross negligence; or

(e) whether the contractor, subcontractor or employer knew or should have known of the violation.

(2) It shall be the responsibility of the contractor, subcontractor or employer to provide the commissioner with evidence of any mitigating circumstances set out in (1) of this rule.

(3) In arriving at the actual amount of the penalty and costs, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or employer for the purpose of reducing the amount of the civil penalty to be assessed.

### **Subchapter 9 Entities Not Eligible for Public Works Contracts**

24.17.901 CONTRACT INELIGIBILITY/DEBARMENT (1) After notice and an opportunity to be heard, the commissioner, acting by and through the department, may determine that a contractor, subcontractor or employer is debarred or ineligible to receive public works contracts for a period of up to three years. A contractor, subcontractor or employer, regardless of entity form, will be determined to be ineligible if the employer aggravatedly, willfully, or with gross negligence violates the provisions of Title 18, chapter 2, MCA, including but not limited to, actions such as:

(a) failing or refusing to pay the prevailing rate of wages to employees employed on public works projects;

(b) failing to respond to inquiries from the department to supply necessary payroll information and generally failing to cooperate in the investigation of the prevailing wage investigation; or

(c) submitting falsified payroll information to the department.

(2) Before placing a contractor, subcontractor or employer on the ineligible debarment list, the commissioner shall serve a notice of intended action upon the contractor, subcontractor or employer in the same manner as service of a summons or by certified mail, return receipt requested. The notice will include:

(a) a reference to 18-2-432, MCA;

(b) a short and concise statement of the matter(s) constituting a violation of Title 18, chapter 2, MCA;

(c) a statement of the party's right to request a contested case hearing and to be represented by counsel at such hearing, provided that any such request must be received by the commissioner in writing within 20 days of service of the notice;

(d) a statement that the party's name will be published on a list of persons ineligible to receive public works contracts or subcontracts, unless the party requests a contested case hearing;

and

(e) a statement that failure to make written request to the commissioner for a contested case hearing within the time specified constitutes a waiver of the right to a hearing.

(3) If a contractor, subcontractor or employer makes a timely request for a contested case hearing, a hearing will be held in accordance with the Montana Administrative Procedure Act.

(4) Upon the failure of the contractor, subcontractor or employer to request a contested case hearing within the time specified, the commissioner or the commissioner's designee shall enter an order supporting the ineligibility action.

(5) Debarment applies both to a firm and individuals. In the case of a firm, it may be applied against any or all businesses in which a firm has involvement (i.e., joint ventures), or over which it has ownership or control (i.e., subsidiaries). In the case of an individual, debarment may be applied to and enforced against any and all businesses in which the individual has any level of interest, ownership or control.

(6) If debarred by the federal government or any Montana government agency, a person may not bid on or otherwise participate in any public works project or contract in any capacity (prime contractor, subcontractor, supplier, etc.), including as a separate contractor, until after the completion of the entire debarment period, whether or not the department debars the individual. Debarment proceedings may continue even if the person ceases doing business during the proceedings.

(7) If an individual is debarred by any agency of the federal government for any period, the department may debar the individual for a period up to that set by the federal government without need for further debarment proceedings. The only evidence required in a debarment hearing in a case based on an existing debarment will be a certified copy of an order, agency letter, or other final action declaring the debarment in the other jurisdiction. Presence of a certified order does not preclude the individual from presenting evidence to dispute the proposed debarment or its length. If the individual is debarred by a branch or agency other than of the Montana or federal governments (i.e., another state, a county, etc.), or if the department may wish a debarment period exceeding that set by the other Montana agency or federal government, the department must hold debarment proceedings before increasing the debarment period.

(8) As used in this rule and ARM 24.17.906, the following definitions apply:

(a) "Aggravatedly" means circumstances that, in conjunction with an act or omission in violation of Title 18, chapter 2, MCA, serve to increase the magnitude, enormity or reprehensibleness of the offense, violation, injury or damage.

(b) "Debarment" is an action taken or decision made by an agency, other than temporary determinations of nonresponsibility or suspension, that excludes a person from bidding on or participating in public works projects and contracts.

(c) "Substantial financial interest" means:

(i) an ownership interest, whether directly or indirectly, of at least 20% of the entity; or

(ii) control over the entity, whether directly or indirectly applied, that is greater than any other single person or entity with an ownership interest.

(d) "Willfully" means that the act is done or omitted with a purpose or willingness to commit the act or make the omission. It does not require any intent to violate the law or to gain an advantage. The term has the same meaning as provided by 1-1-204, MCA.

(e) "Gross negligence" means an action involving negligence in excess of ordinary negligence.

Rules 24.17.902 through 24.17.905 reserved

24.17.906 LIST OF INELIGIBLES (1) The department will publish a list of persons and entities that are ineligible to work on public works projects. The list will specify the dates of ineligibility. The list is public information and is available upon request from the department. The department will update the list as needed.

(2) The list will contain the name of ineligible employers and the names of any firms, corporations, partnerships or associations in which the employer or its owner(s) have a substantial financial interest. Those names will remain on the list for a period of three years from the date such names were first published on the list. The three year period of ineligibility will begin when the decision of the commissioner regarding ineligibility becomes final and no further appeals can be taken.

(3) An employer who desires to be removed from the list before the expiration of three years must show good cause for such removal. Such persons may petition the commissioner at any time during the period of ineligibility. The decision whether good cause exists to remove the employer from the list before the three year period expires rests in the sound discretion of the commissioner. In reviewing such petitions to determine if good cause exists, the commissioner shall consider the following matters:

(a) the history of the petitioner in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) prior violations, if any, of statutes or rules;

(c) magnitude and seriousness of the violation; and

(d) other matters which indicate to the commissioner that the petitioner is not likely to violate these rules in the future.